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In the Supreme Court of the United States

OCTOBER TERM, 1959

STANFORD R. BROOKSHIRE and wife, EDITH M. BROOKSHIRE, and VORIS C. BROOKSHIRE and wife, HELEN M. BROOKSHIRE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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For years prior to 1952, a partnership of which the taxpayers were members kept its books and reported its income on the cash method of accounting, and the returns were accepted by the Commissioner as clearly reflecting the partnership's income. At the beginning of that year, the partnership had substantial accounts receivable from sales made in 1951,

which it properly failed to report as income for 1951 because the amounts had not yet been collected. It also had goods on hand, the cost of which had been paid for and properly deducted in prior years. In 1952 (the taxable year), without seeking or obtaining the Commissioner's permission, the partnership changed from the cash to the accrual method of accounting, with the results (1) that the accounts receivable from sales made in 1951 and collected in 1952 were not reported as income in either year, and (2) that the cost of goods paid for and already deducted in prior years was again deducted in 1952. The Commissioner accepted the 1952 return on the accrual basis, but in order correctly to reflect the partnership's net income, he included the unreported sales proceeds in gross income and disallowed the repeated deduction. The Commissioner's action resulted in the deficiencies in controversy.

The court below, in a carefully reasoned opinion affirming the Tax Court, held that the taxpayer-partners could not escape tax on part of their business income by changing the partnership's method of reporting its income from the cash to the accrual basis, and it accordingly sustained the Commissioner's adjustments. Its decision is in complete accord with the applicable statutory provisions (Sections 41, 42 and 43 of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed., 41, 42 and 43)), the implementing Treasury Regulations (Sections 39.41-1, 39.41-2 and 39.41-3 of Regulations 118), and the relevant decisions (*Advance Truck Co.* v. *Commis-*

sioner, 262 F.2d 388 (C.A. 9th); *Goodrich* v. *Commissioner*, 243 F.2d 686 (C.A. 8th)).[1]

The cases upon which the taxpayers rely (Pet. 12-19) do not present a conflict. As pointed out in the opinions below (Pet. App. A 9-10; Pet. App. B 11), they are distinguishable on one or both of two grounds: either because the change in accounting method was not made voluntarily by the taxpayer but was required by the Commissioner (*e.g.*, *Welp* v. *United States*, 201 F. 2d 128 (C.A. 8th)); or because the taxpayer had mistakenly failed to report income (or had mistakenly taken a deduction) in a year prior to the year of change-over (*e.g.*, *Commissioner* v. *Dwyer*, 203 F.2d 522 (C.A. 2d)). No such situation is here presented. In the instant case, the change in accounting method was made voluntarily,

[1] The decision is also in harmony with Section 481(a) of the Internal Revenue Code of 1954, as amended by Section 29 (a) (1) of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606 (26 U.S.C. 481(a)), which specifically requires a taxpayer who changes his method of accounting to make adjustments "in order to prevent amounts from being duplicated or omitted". See also, H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 50, A164 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4075-4076, 4303)), pointing out that such adjustments are necessary to prevent "ommissions or doubling ups" of items of income or deduction, and that "under the present law" they are made "whenever the taxpayer requests permission to change his method of accounting". A *fortiori*, such adjustments are required where (as here) the taxpayer voluntarily changes his method of accounting without requesting the Commissioner's consent. See Section 39.41-2 of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939; *Bauman* v. *Commissioner*, 22 T.C. 7.

without securing the Commissioner's consent. And, as both courts below found (Pet. App. A 9; Pet. App. B 11), the partnership correctly (not mistakenly) used and applied the cash method for years prior to 1952. In the words of the court below (Pet. App. A 11): "The adjustments required by the Commissioner were made to prevent duplications or omissions resulting from the voluntary changeover. They were not made to correct errors of past years."

The decision below is clearly correct. There is no conflict, nor any other occasion for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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